# **ATTACHMENT 4**

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12	UNITED STATES DISTRICT COURT			
13	NORTHERN DISTRICT OF CALIFORNIA			
14	(SAN FRANCISCO DIVISION)			
15	DADE CAMMODE DAM TUDE (CDT)		N 07 5044 GG	
16	IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	C	ase No. 07-5944 SC MDL No. 1917	
17				
18	This Document Relates to			
19	Case No. 13-cv-1173-SC (N.D. Cal.)			
20	SHARP ELECTRONICS CORPORATION;	THE TOS	HIBA DEFENDANTS'	
21	SHARP ELECTRONICS MANUFACTURING COMPANY OF AMERICA, INC.,		FOR LEAVE TO AMEND OTION TO DISMISS	
22	COMITANT OF AMERICA, INC.,		COMPLAINT	
23	Plaintiffs,	ORAL AR	GUMENT REQUESTED	
24	V.		_	
25	HITACHI, LTD., et al.,	Date: Time:	January 24, 2014 10:00 a.m.	
26		Before:	Hon. Samuel Conti	
27	Defendants.			
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#### **NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Toshiba Corporation, Toshiba America, Inc., Toshiba America Information Systems, Inc., and Toshiba America Electronic Components, Inc. (the "Toshiba Defendants") hereby move the Court for an order granting the Toshiba Defendants leave to file their Amended Motion to Dismiss Sharp's Complaint.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, and such other materials and information that the Court may properly consider.

THE TOSHIBA DEFENDANTS' MOTION FOR LEAVE TO AMEND THEIR MOTION TO DISMISS SHARP'S COMPLAINT Case No. 07-5944 SC MDL No. 1917

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### **MEMORANDUM OF POINTS AND AUTHORITIES**

The Toshiba Defendants, by and through their undersigned counsel, hereby respectfully submit this Memorandum in Support of their Motion for Leave to Amend the Toshiba Defendants' Motion to Dismiss Sharp's Complaint ("Motion for Leave to Amend"). As reflected in the Toshiba Defendants' proposed amended motion to dismiss attached hereto as Exhibit A — the Toshiba Defendants, pursuant to the Supreme Court's December 3, 2013 decision in Atlantic Marine Const. Co., Inc. v. U.S. Dist. Ct. for the W. Dist. of Tex., No 12-929, slip op. (U.S. Dec. 3, 2013), seek to amend the procedural grounds upon which they request the Court to dismiss the claims made by Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. (collectively, "Sharp"). Whereas the Toshiba Defendants' original motion to dismiss relied upon Rules 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure in support of their position that a forum-selection clause between Sharp and Toshiba requires dismissal of Sharp's claims, the Toshiba Defendants now seek to dismiss Sharp's claims based upon the doctrine of forum non conveniens and Rule 12(b)(6) of the Federal Rules of Civil Procedure. This is a minor technical amendment that will not prejudice Sharp. Because the Toshiba Defendants continue to rely upon their memoranda in support of their original motion to dismiss, no additional briefing is required.

In *Atlantic Marine*, the Supreme Court observed that the proper procedural grounds "to enforce a forum-selection clause pointing to a [] foreign forum is through the doctrine of *forum non conveniens*." Slip op. at 9-10. This statement deviates from long-standing Ninth Circuit precedent providing that claims that are subject to a forum-selection clause should be considered under Rule 12(b)(3) of the Federal Rules of Civil Procedure. *See Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996) (treating "a motion to dismiss premised on the enforcement of a forum selection clause" as a "Rule 12(b)(3) motion to dismiss for improper venue"). The Toshiba Defendants followed this Ninth Circuit precedent in their Motion to Dismiss by relying upon Rule 12(b)(3) in support of their request that the Court dismiss Sharp's claims. *See* Toshiba's Motion to Dismiss Sharp's

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Complaint at 1, *In re CRT Antitrust Litig.*, MDL No. 07-5944 (N.D. Cal. Oct. 7, 2013), ECF No. 2000 ("Motion to Dismiss"). Because the Supreme Court issued its *Atlantic Marine* decision after the briefing on this motion was complete, but before the scheduled hearing on December 20, 2013, the Toshiba Defendants file this motion for leave to amend their motion to reflect the proper procedural grounds for dismissing Sharp's Complaint.

Although there is "no procedural rule specifically addressing amendments to motions to dismiss" (Vanslambrouck v. Fairfield Indus. Inc., 2:11-CV-76-FTM-29SPC, 2011 WL 2435947, at \*1 (M.D. Fla. June 15, 2011)), courts will follow Rule 1 of the Federal Rules of Civil Procedure and will grant such motions when they promote the "just, speedy, and inexpensive determination" of an action. In considering a motion for leave to file an amended motion to dismiss, the Vanslambrouck Court noted that there was "no bad faith, or intent to manipulate the court proceedings, and no prejudice to the plaintiffs." Vanslambrouck, 2011 WL 2435947, at \*2. Thus, the Vanslambrouck Court allowed the amendment. The Court in Styles v. Triple Crown Publications, LLC, CIV. WDQ-11-3759, 2012 WL 1964443, at \*3 (D. Md. May 30, 2012), also considered a motion for leave to file an amended motion to dismiss, observing that the Court had not yet ruled upon the original motion to dismiss and that the plaintiffs would have the opportunity to respond to the amended motion to dismiss. In these circumstances, the Court allowed the amended motion to dismiss because the plaintiff "will not suffer any prejudice" and "allowing the amendment furthers judicial economy. *Id.* at \*3. The *Styles* Court observed that there "is simply no reason to put [the Defendants] to the time and expense of filing an answer, or both [the Defendants and Styles] to the time and expense of addressing . . . issue[s] to be raised later in a motion for judgment on the pleadings, when [the issues] can easily be resolved now." Id. (quoting In re Westinghouse Sec. Litig., No. A-91-354, 1998 WL 119554, at \*6 (W.D. Pa. Mar. 12, 1998) (internal quotation marks omitted)).

Sharp will not be prejudiced if the Court grants the Toshiba Defendants' Motion for Leave to Amend. Sharp will have the opportunity to respond to the amended motion to dismiss. In reality, however, there should be no need for Sharp to file any response. The

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amended motion merely replaces Rule 12(b)(3) with the doctrine of forum non conveniens as a basis for the motion to dismiss. The amended motion relies upon the pre-existing briefing because the Supreme Court in Atlantic Marine did not change the substantive analysis associated with the enforcement of forum-selections clauses; rather, that decision only addressed the appropriate procedural mechanism to be used by courts and litigants. In Atlantic Marine, the Supreme Court directed district courts to consider "public-interest factors" and not arguments related to the inconvenience of a "preselected forum" in determining the enforceability of a freely negotiated forum-selection clause under the doctrine of forum non conveniens. Slip op. at 13-14. This analysis is substantively the same as the analysis previously used the Ninth Circuit under Rule 12(b)(3). See Richards v. Lloyd's of London, 135 F.3d 1289, 1295-96 (9th Cir. 1998) (holding that enforcement of a foreign forum-selection clause does not violate public policy). Accordingly, the arguments presented in the Toshiba Defendants' Memorandum of Points and Authorities in Support of their Motion to Dismiss and their Reply in Support of their Motion to Dismiss also establish the grounds for the Court to dismiss Sharp's Complaint under the doctrine of forum non conveniens.

Granting the motion for leave to amend the motion to dismiss also furthers judicial economy. Even though the Toshiba Defendants have already filed their motion to dismiss against Sharp's claims, the Toshiba Defendants have not waived their ability to seek dismissal of Sharp's claims under the doctrine of forum non conveniens. These arguments could be raised in a later motion. See Chateau Des Charmes Wines Ltd. v. Sabate USA, Inc., C-01-4203 MMC, 2003 WL 22682483, at \*2 (N.D. Cal. Nov. 10, 2003) (allowing defendant to file a second motion to dismiss under the doctrine of forum non conveniens even though the defendant already filed a motion under Rule 12(b)(3)). Consequently, the Toshiba Defendants proposed amendment to its motion to dismiss seeks only to invoke an argument that could be brought later via other means.

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16	Inc	and Toshiba America Electronic
17	Com	ponents, Inc.
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Case No. 07-5944 SC

## **CERTIFICATE OF SERVICE**

On December 9, 2013, I caused a copy of "THE TOSHIBA DEFENDANTS' MOTION FOR LEAVE TO AMEND THEIR MOTION TO DISMISS SHARP'S COMPLAINT" to be electronically filed via the Court's Electronic Case Filing System, which constitutes service in this action pursuant to the Court's order of September 29, 2008.

/s/ Lucius B. Lau
Lucius B. Lau

THE TOSHIBA DEFENDANTS' MOTION FOR LEAVE TO AMEND THEIR MOTION TO DISMISS SHARP'S COMPLAINT Case No. 07-5944 SC MDL No. 1917

# Exhibit A

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11	Electronic Components, Inc.			
12	UNITED STATES DISTRICT COURT			
13	NORTHERN DISTRICT OF CALIFORNIA			
14	(SAN FRANCISCO	DIVISION)		
15				
16	IN RE: CATHODE RAY TUBE (CRT)	Case No. 07-5944 SC		
17	ANTITRUST LITIGATION	MDL No. 1917		
18				
19	This Document Relates to			
	Case No. 13-cv-1173-SC (N.D. Cal.)			
20	SHARP ELECTRONICS CORPORATION;	THE TOSHIBA DEFENDANTS'		
21	SHARP ELECTRONICS MANUFACTURING COMPANY OF AMERICA, INC.,	AMENDED NOTICE OF MOTION AND MOTION TO DISMISS		
22	,	SHARP'S COMPLAINT		
23	Plaintiffs,	ORAL ARGUMENT REQUESTED		
24	v.	_		
25	HITACHI LTD at al	Date: January 24, 2014 Time: 10:00 a.m.		
26	HITACHI, LTD., et al.,	Before: Hon. Samuel Conti		
27	Defendants.			
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#### AMENDED NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 24, 2014, at 10:00 a.m., or as soon thereafter as the matter may be heard, in Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Samuel Conti, Toshiba Corporation ("TSB"), Toshiba America, Inc. ("TAI"), Toshiba America Information Systems, Inc. ("TAIS"), and Toshiba America Electronic Components, Inc. ("TAEC") (collectively, the "Toshiba Defendants") will and hereby do move the Court for an order dismissing the Complaint of Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. ("collectively, the "Plaintiffs" or "Sharp") ("Complaint") as against the Toshiba Defendants pursuant to the doctrine of forum non conveniens and Rule 12(b)(6) of the Federal Rules of Civil Procedure. Sharp's Complaint must be dismissed against the Toshiba Defendants because its claims are based on purchases that are governed by a contract containing a mandatory forum selection clause that selects the Osaka District Court, in Osaka, Japan, as the forum to resolve disputes arising out of the contract. In the alternative, Sharp's federal and New Jersey state law claims for damages for its alleged purchases of products that contain CRTs ("CRT Products") must be dismissed against the Toshiba Defendants because Sharp has failed to allege facts sufficient to support standing under the "ownership or control" exception to Illinois Brick's bar on indirect purchaser actions.

This Amended Motion is based upon this Amended Notice of Motion, the Memorandum of Points and Authorities filed by the Toshiba Defendants on October 7, 2013, the Reply Memorandum filed by the Toshiba Defendants on November 20, 2013, the complete files and records in this action, oral argument of counsel, and such other and further matters as this Court may consider.

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THE TOSHIBA DEFENDANTS' AMENDED NOTICE OF MOTION AND MOTION TO DISMISS SHARP'S COMPLAINT Case No. 07-5944 SC MDL No. 1917

1	1 Respectfully	y submitted,
2	2 Dated: December 9, 2013 WHITE δ	CASELLP
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